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February 5, 2003

**Via ECFS**

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W., Room TWB-204
Washington, D.C. 20554

**Re: UNE Triennial Review, CC Docket Nos. 01-338, 96-98, 98-147**
***Ex Parte Notification***

Dear Ms. Dortch:

On Monday, February 3, 2002, BellSouth filed a copy of what it called a "recent report". NuVox believes that it is critical that the Commission know that the document filed by BellSouth is not a final Georgia PSC decision and that NuVox has petitioned the Georgia PSC not to adopt the findings and conclusions recommended by the Honorable Nancy Gibson, presiding Hearing Officer. Following up on BellSouth's selective filing, NuVox wishes to select a few documents of its own to submit into the record in this proceeding. Attached are NuVox's Application to Modify or Review and BellSouth's Response. These documents will provide the Commission with a new level of insight into how BellSouth is abusing the limited audit rights granted by the Commission in its *Supplemental Order Clarification.* Since these have been filed, the parties have engaged in a heated debate about the facts and a particular assertion made by BellSouth for the first time in its post-oral argument brief. That statement, which appeared to be one upon which the Hearing Officer' recommendation turned, is as follows:

> BellSouth's records reflect that, at least in one state, local traffic constituted only 25% of the total traffic on NuVox's network. Of course traffic patterns vary depending on the nature of its business, but the fact that NuVox's circuits carry only 25% local traffic may indicate that NuVox is not the exclusive provider of local exchange service for customers NuVox is serving.[1]

[1] BellSouth Brief at 11.

*Since that statement was made and the Hearing Officer's decision was issued,* NuVox has confirmed the following about BellSouth's assertions.

- The "at least in one state" really means "in only one state". Moreover, it appears that both BellSouth and NuVox have traffic measurements in each state showing that over 90% of NuVox's traffic is local. In addition, BellSouth apparently has no other record from any state that even suggests that the level of local traffic carried by NuVox is below the national average of 78%.
- The "one state" is not and never has been Georgia.
- The "records" do not reflect the "total traffic" on NuVox's network. At a meeting with staff on January 9, 2003, BellSouth's Keith Milner confirmed that BellSouth does not have the capacity to measure traffic on NuVox's network, but can only measure traffic sent by NuVox to BellSouth for switching by BellSouth. NuVox has a robust customer base and switching platform – it has no need to send all of its traffic through BellSouth (although it certainly sends a significant amount of traffic to BellSouth).
- BellSouth's assertion that "the fact that NuVox's circuits carry only 25% local traffic" is not a fact. Mr. Millner confirmed that BellSouth is incapable of measuring traffic on any of NuVox's circuits, including the EEL circuits at issue in this proceeding.

The following have never been confirmed about BellSouth's assertions:

- Whether BellSouth's definition of "local traffic" comports with the parameters set forth by the FCC in note 64 of its *Supplemental Order Clarification.*
- Whether BellSouth's secret record is valid and the equipment used to make it is reliable. At a meeting with staff on January 9, 2003, BellSouth's Keith Milner did agree that the 25% figure did appear to be an aberration. At the same staff meeting, NuVox also learned that the Tennessee 25% figure is not a PLU, although it was described erroneously as an "average PLU" in BellSouth's December 17, 2003 letter filing.
- Whether BellSouth's recording equipment recorded anything other than transit trunk traffic.

NuVox also notes that BellSouth recently asked the Commission to grant it the right to conduct "random audits", as if to seek cover for its current practice (which the law does not permit).[2] Obviously, NuVox opposes BellSouth's attempt to seek expanded audit rights and subsequent cover for its current abuses.

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[2] BellSouth January 21, 2003 *Ex Parte* at 7.

Please feel free to contact me, if you have any questions regarding this written *ex parte* submission and the attachments hereto. In accordance with the Commission's rules, this letter, including attachments is being filed electronically for inclusion in the public record of each of the above-referenced proceedings.

Respectfully submitted,

John J. Heitmann

JJH/cpa
cc: Christopher Libertelli
Matt Brill
Jordan Goldstein
Lisa Zaina
Dan Gonzalez
Bill Maher
Rich Lerner
Jeff Carlisle
Scott Bergmann
Michelle Carey
Tom Navin
Brent Olsen
Jeremy Miller
Julie Veach
Qualex International

DEC 0 4 2002

**Before the**
**GEORGIA PUBLIC SERVICE COMMISSION**

| | | |
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| In re: | ) | |
| | ) | |
| Enforcement of Interconnection Agreement between BellSouth Telecommunications, Inc. and NuVox Communications, Inc. | ) | Docket No. 12778-U |

**APPLICATION TO MODIFY OR REVIEW ORDER, AND TO STAY THE ORDER PENDING REVIEW**

NuVox Communications, Inc. ("NuVox"), by its attorneys and pursuant to O.C.G.A. § 50-13-17(a), hereby files this Application to Modify or Review the Hearing Officer's Order Denying Request to Dismiss, Deny or Stay Consideration, Denying Request to Enter an Order That the Interconnection Agreement Has Been Breached and Granting Request to Audit (the "*Order*"), issued by the Hearing Officer on November 4, 2002, in the above-captioned docket.[1] Additionally, NuVox respectfully requests that the Georgia Public Service Commission (the "Commission") use its discretionary authority, pursuant to O.C.G.A. § 50-13-19(d), to stay the effect of the *Order* until review has been completed.

Specifically, NuVox respectfully submits that the Hearing Officer erred in concluding that BellSouth Telecommunications, Inc. ("BellSouth") may proceed with an audit of circuits NuVox has converted from special access to enhanced extended links ("EELs") because BellSouth "has not, yet, violated" the Federal Communications Commission's ("FCC's")

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[1] Although styled as an "Order", *Order* at 1, 10-11, the Hearing Officer characterizes the *Order* as a "recommendation". *Order* at 10. Thus, NuVox respectfully has styled this Application as an Application to Modify or Review, as it is unclear whether the *Order* is intended to be an initial decision or whether the Hearing Officer intended merely to certify the record and recommend an order for the Commission to consider. Thus, this Application is filed with the intent of covering either circumstance by requesting modification or review and specifically requesting that the Commission not adopt the *Order* as written, or to reverse it, to vacate it, or to otherwise modify it consistent with the argument presented herein and prior to its becoming effective.

*Supplemental Order.*[2] This erroneous legal conclusion rests upon mistaken findings of fact. Thus, NuVox also respectfully submits that the Hearing Officer erred in concluding that the record in this proceeding supports findings that (1) BellSouth has stated a reasonable basis for "concern" regarding NuVox's self-certified compliance with FCC safe harbor Option 1,[3] and (2) that the auditor selected by BellSouth satisfies the FCC's requirement that such an auditor be "independent".[4]

In reaching these conclusions and findings, the Hearing Examiner appears to have mistakenly accepted BellSouth's assertion of (1) a "concern" that has absolutely no bearing on the converted Georgia EELs circuits at issue and that is not relevant to compliance with the safe harbor Option 1 criteria specified by the FCC, and (2) that the FCC intended to buck precedent and apply something other than commonly accepted AICPA standards to determine whether or not an auditor is "independent". In light of these errors, NuVox respectfully requests that the Commission modify or reverse the *Order* and conclude that BellSouth may not proceed with its requested audit because it has violated the limitations placed on incumbent LEC audit rights under the *Supplemental Order* and find that BellSouth has failed to (1) state a reasonable "concern" for initiating an audit, as required by the FCC's *Supplemental Order*, and (2) select an auditor that qualifies as "independent", as that term has been interpreted by the FCC.[5]

Finally, because NuVox would be irreparably harmed if the audit was allowed to proceed per the *Order* and NuVox ultimately prevailed on this Application (in which NuVox requests

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2 *Order* at 5-10 (citing Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, *Supplemental Order Clarification*, 15 FCC Rcd 9587 (2000) ("*Supplemental Order*")).

3 *Order* at 6-8.

4 *Id.* at 8-10.

5 NuVox notes that the Hearing Officer declined to decide whether BellSouth must comply with the FCC's *Supplemental Order*. *Order* at 5. Grant of this Application likely would compel a finding on that issue. Because NuVox has not had the opportunity to rebut BellSouth's briefing in that regard (briefs were filed simultaneously), NuVox requests an opportunity for additional briefing on that issue.

that the audit not be allowed to proceed), there is good cause for the Commission to stay the *Order* until review is completed.

## I. The Hearing Officer Erred in Finding that BellSouth's Stated "Concern" Complies with the Requirements of the *Supplemental Order*

In the *Order*, the Hearing Officer found that BellSouth had provided a reasonable basis to establish a "concern" to support initiation of an audit.[6] Based in part on that finding, the Hearing Officer concluded, that "BellSouth has not, yet, violated the audit requirements of the Supplemental Order."[7] NuVox respectfully submits that both the factual finding and legal conclusion of the Hearing Examiner are erroneous and must be modified or reversed.

It is undisputed that with respect to all circuits in question (circuits that have been converted from special access to EELs in Georgia), NuVox has certified compliance with FCC safe harbor Option 1. Safe Harbor Option 1 provides, in relevant part:

> [T]he requesting carrier certifies that it is the exclusive provider of an end user's local exchange service. The loop-transport combinations must terminate at the requesting carrier's collocation arrangement in at least one incumbent LEC central office. . . . The carrier can then use the loop-transport combinations that serve the end user to carry any type of traffic, including using them to carry 100 percent interstate access traffic.[8]

Thus, a carrier that certifies compliance under Option 1, such as NuVox did, is certifying that it is the exclusive provider of local exchange service to the end user at one end of the circuit and that the other end of the circuit terminates at a collocation.

Under safe harbor Option 1, a carrier is deemed to be providing a significant amount of local exchange service to an end user by virtue of the fact that it is the end user's exclusive

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6 *Order* at 8.

7 *Id.* at 5 (emphasis removed).

8 *Supplemental Order*, 15 FCC Rcd at 9598 (¶ 22) (footnotes omitted) (emphasis added).

provider of local service.[9] Under Option 1, the FCC does not deem any particular amount of local service to be significant and, in fact, does not require that the local service – however much of it – be provided over the circuit that has been converted to an EEL.[10] Indeed, the FCC expressly states that a competitive LEC need not carry any local traffic over the converted circuit and that it may be used to carry "100 percent interstate access traffic".[11] Thus, the percentage of local traffic carried over circuits converted under safe harbor Option 1 is irrelevant and is certainly not probative of a competitive LEC's compliance with the requirement under that option that NuVox be the exclusive provider of an end user's local exchange service.[12] The record contains no evidence that NuVox is not the exclusive provider of local service to any of the Georgia end users served by the converted EELs that BellSouth seeks to audit – nor does it contain any evidence that might even suggest that NuVox has not properly self-certified compliance with FCC safe harbor Option 1.

Having no relevant basis for questioning NuVox's certified compliance with Option 1, BellSouth instead contended that its concern for requesting the audit was based on its "records" from Tennessee and Florida that allegedly indicate that "an inordinate amount of traffic from NuVox is not local, and that NuVox changed its jurisdictional factor significantly."[13] Yet, the *Supplemental Order* makes clear that specific percentages of local traffic and jurisdictional reporting have nothing to do with criteria set forth in FCC safe harbor Option 1.[14] Nevertheless, BellSouth did not disclose the study it relied on, what circuits it studied (the "from NuVox"

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9 *Id.*

10 *Id.*

11 *Id.*

12 *See id.*

13 *Order* at 6.

14 *Supplemental Order*, 15 FCC Rcd at 9598 (¶ 22) (footnotes omitted).

language in its assertion indicates that BellSouth did not study end user circuits), what jurisdictional factor had changed (or where, when or why), or what it deemed to be "an inordinate amount" (or why BellSouth should be permitted to be the judge of that). Thus, in addition to being irrelevant, BellSouth's assertion is alarmingly vague and unsubstantiated.

Critically, BellSouth presented absolutely no evidence with respect to NuVox's traffic in Georgia – either generally, or specifically related to the circuits at issue.[15] BellSouth also provided no evidence as to how NuVox's "jurisdictional factor" had changed significantly (in Georgia or otherwise). Casting further doubt on BellSouth's vague and unsupported assertions regarding changes in an unidentified "jurisdictional factor", NuVox disclosed in its brief that the parties had recently settled a dispute wherein BellSouth falsely manufactured jurisdictional factors for NuVox (and without NuVox's consent) that had no relationship to NuVox's traffic, in an effort to raise NuVox's costs and artificially inflate its own revenues.[16] In short, there is no basis to believe that BellSouth's vague assertions about its "records" in another state are either valid or relevant. Thus, to the extent that the Hearing Officer relied on BellSouth's assertions regarding NuVox's traffic or jurisdictional factors in Florida and Tennessee,[17] NuVox believes that such reliance was misplaced and may have contributed to mistaken conclusions and findings regarding the prerequisite "concern" for initiating an audit.

In its post-oral argument brief, BellSouth also contended that, in some undisclosed state other than Georgia, local traffic constituted only 25% of the total traffic on NuVox's network.[18] BellSouth did not disclose how it conducted a study of the "total traffic on NuVox's network",

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15 Statewide jurisdictional factors for Florida and Tennessee do not provide any insight as to the type of traffic carried over individual circuits converted to EELs in those states or in Georgia. *See* NuVox Brief at 17.

16 NuVox Brief at 16.

17 In the *Order*, the Hearing Officer does not expressly indicate which of BellSouth's assertions she found compelling and worthy of acceptance by the Commission.

18 *Order* at 7.

and in fact, NuVox believes that it would be impossible for BellSouth to conduct such a study. To be sure, NuVox believes that BellSouth's assertion is most certainly a gross misrepresentation of whatever limited traffic study it actually conducted, as NuVox stated and affirmed in its brief that its reported jurisdictional factors for local traffic are higher than 90% in Georgia, Florida, Tennessee and the other BellSouth states.[19] The Hearing Officer apparently overlooked this fact, which likely contributed to mistaken findings and conclusions regarding the prerequisite "concern" for initiating an audit.

Notably, the 25% local traffic figure alleged by BellSouth is more than that which the FCC would require and deem to be a significant amount of local traffic under FCC safe harbor Option 1 and, if NuVox had not certified that it is the exclusive provider of local service, under FCC safe harbor Option 2.[20] Only safe harbor Option 3, which allows a converted EEL circuit to terminate at a requesting carrier's POP instead of a collocation, requires greater than 25% local traffic.[21] All circuits in question terminate at collocations and BellSouth has never contended that they do not. Thus, there is no circumstance that the FCC does not deem significant a 25% local traffic level on converted circuits such as the ones at issue in this proceeding which terminate at collocations.[22] To the extent that the Hearing Examiner may have mistakenly concluded that BellSouth's 25% figure had any relevance, such mistake may have been further compounded by acceptance of BellSouth's implication that the FCC had somehow found that 25% was not a significant amount of local traffic for EELs terminating to a collocation.

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19 NuVox Brief at 17, Verification of Hamilton E. Russell, III, attached thereto.

20 *Supplemental Order*, 15 FCC Rcd at 9598 (¶ 22) (Option 2 includes a 10% local traffic threshold for the loop facility).

21 *Id.* (Option 3 allows converted circuits to terminate to a POP and includes a 33% local traffic threshold for the loop facility).

22 *Id.*

BellSouth also stated that historical data indicates that local traffic generally constitutes 87% of the total traffic originated on the BellSouth network.[23] Although NuVox generally does not serve residential or large enterprise customers like BellSouth does and there is no reason to think that NuVox's traffic patterns necessarily should mirror those of BellSouth, NuVox's data (about NuVox's network) nevertheless does not appear to differ dramatically from BellSouth's data (about BellSouth's network). As stated above, NuVox's reported jurisdictional factors for local traffic in Georgia are greater than 90%. Thus, contrary to BellSouth's assertion, factors reported by NuVox (and accepted by BellSouth) indicate that NuVox's traffic does not appear to differ dramatically from the amount of local traffic that BellSouth now asserts that it carries. Here, too, the Hearing Officer seems to have overlooked this fact, which may have contributed to the mistaken findings and conclusions regarding the prerequisite "concern" for initiating an audit.

Most critically, however, the Hearing Officer appears to have been swayed by BellSouth's claim that "the fact that NuVox's circuits carry only 25% local traffic may indicate that NuVox is not the exclusive provider of local exchange service for the customers NuVox is serving."[24] BellSouth's claim is based on a misstatement or misrepresentation that its entirely unsubstantiated 25% local traffic figure relates to the circuits at issue in this proceeding. We know little more about BellSouth's alleged 25% local traffic figure other than that it does not relate to any of NuVox's traffic in Georgia.[25] Thus, the 25% figure has no relation to the circuits at issue in this proceeding. The undeniable fact is that the record contains no evidence that the converted Georgia EELs circuits in question carry only 25% local traffic.

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23 *Order* at 7.

24 *Id.* (citing BellSouth Brief at 11)(emphasis added).

25 BellSouth raised the 25% figure for the first time in its post-hearing brief. Neither NuVox nor the Hearing Officer have had any opportunity to explore or respond to BellSouth's unfounded assertion.

The only Georgia local traffic factors in the record are statewide factors that indicate that more than 90% of NuVox's traffic is local.[26] Thus, if any implication is to be gathered from statewide jurisdictional factors, such implication should be drawn from the Georgia-specific factors reported by NuVox and not from the cryptic "records" from an unidentified state other than Georgia and relied upon by BellSouth. To the extent that the Hearing Officer accepted or relied on BellSouth's claim, she did so in error, as the claim is based on a misstatement or misrepresentation of the facts and ignores the fact that NuVox's Georgia specific local jurisdictional factors are not 25% but are actually greater than 90%.

Nevertheless, the express language of Option 1 makes clear that the percentage of local traffic carried over the converted circuits is not indicative of whether a carrier is the exclusive provider of local service to the end user served by the converted circuit in question, as being the exclusive provider satisfies the significant amount of local exchange service requirement without reference to particular percentages of local traffic.[27] Indeed, to use the percentage of local traffic carried over the converted circuits as an indication of whether a carrier was the exclusive provider of local exchange service would contradict the express language of Option 1 which does not require that any percentage of local traffic be generated by the end user served or carried over the converted circuits.[28] The FCC made this point eminently clear by expressly stating that a circuit converted under Option 1 could be used to carry 100% interstate access traffic (which would leave no room for any local telephone exchange traffic).[29]

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26 NuVox Brief at 17.

27 *Supplemental Order*, 15 FCC Rcd at 9598 (¶ 22)

28 *See id.*

29 *Id.*

Thus, the factual predicate for BellSouth's concern is a misstatement or misrepresentation, and the implication raised by it is contradicted by the express language in Option 1. Accordingly, it was a mistake for the Hearing Officer to find that BellSouth had stated a reasonable concern for initiating an audit and to conclude that BellSouth has not, yet, violated the audit requirements of the *Supplemental Order*.

Because BellSouth's stated concern is (1) entirely unrelated to NuVox's converted EELs circuits in the state of Georgia (and in all other states), (2) premised on a misstatement or misrepresentation of fact, and (3) rests on an implication that is contradicted by the express language of the *Supplemental Order* and is neither indicative nor probative of compliance with FCC safe harbor Option 1, the Hearing Officer's finding that BellSouth had stated a reasonable concern for requesting an audit is a mistake, as is the *Order's* conclusion that BellSouth has not violated the audit requirements of the *Supplemental Order*. Accordingly, NuVox respectfully requests that the Commission modify or reverse the *Order* and find that BellSouth has not provided a reasonable concern for requesting an audit. Moreover, because BellSouth has requested an audit without expressing a reasonable basis for its concern, the Commission must also modify or reverse the *Order's* conclusion that BellSouth has not, yet, violated the audit requirements of the *Supplemental Order*. Under these circumstances, the Commission must also modify or reverse language in the *Order* granting BellSouth's request to audit NuVox, which clearly must be denied.

## II. The Hearing Officer Failed to Recognize the Limitations Placed On an Incumbent LEC's Right to Audit and Mistakenly Accepted BellSouth's Assertion that the FCC Intended to Allow Audits as a Routine Response to Self-Certification by Competitive LECs

The *Order* recognizes that the *Supplemental Order* provides that an audit would only be undertaken when the incumbent LEC has stated a "concern" that a requesting carrier has not met the qualifying criteria for providing a significant amount of local exchange service.[30] The *Order*, however, also indicates that the Hearing Officer accepted or was swayed by BellSouth's contention that the FCC's intent with respect to level of concern was essentially not to limit an incumbent LEC's right to audit, but instead that an incumbent LEC's right to audit results from a heretofore undisclosed "trade-off" or "balancing" between requiring the incumbent LEC to automatically convert circuits upon pre-certification of compliance by a competitive LEC while requiring the competitive LEC to allow the incumbent LEC to (routinely or automatically) audit such self-certified compliance.[31]

The *Supplemental Order* does not speak of the "trade-off" or "balancing" alleged by BellSouth and apparently accepted by the Hearing Officer. Indeed, the FCC initially deemed self-certification by competitive LECs to be adequate assurance of compliance and prohibited incumbent LEC audits before or after conversions were completed.[32] The incumbent LECs were only granted limited audit rights after the FCC extended the effective term of the interim use restrictions embodied by the so-called "safe harbors".[33] The fact that these interim measures have been in place longer than perhaps anyone could have contemplated (the FCC initially

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30 *Order* at 5, 8.

31 *Order* at 8.

32 *Supplemental Order*, 15 FCC Rcd at 9587 (¶ 29)(referring to Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, *Supplemental Order*, 15 FCC Rcd 1760 at n.9 (1999) ("*First Supplemental Order*")).

33 *Id.*

promised that its temporary use restrictions would expire in June of 2000[34]) does not change the fact that the FCC *still* requires competitive LEC self-certification of compliance and *still* grants only a "limited" audit right with respect to that self-certified compliance.

Moreover, while the FCC did not set forth specific conditions or a standard of evidence with respect to the level of concern,[35] the Commission is hardly without guidance. Based on the FCC's use of the words "limited", "only", and "not routine" in the *Supplemental Order*, it is apparent that the FCC must have intended, at a minimum, that the incumbent LEC state a concern that is reasonably related to compliance with the qualifying criteria set forth in the relevant Option and not one that is unrelated or fabricated (by misstatement or misrepresentation), as is the case here. Specifically, the *Supplemental Order* states that,

> In order to confirm reasonable compliance with the local usage requirements in this Order, we also find that incumbent LECs may conduct limited audits only to the extent reasonably necessary to determine a requesting carriers compliance with the local usage options. . . . [A]udits will not be routine practice, but will only be undertaken when the incumbent LEC has a concern that a requesting carrier has not met the criteria for providing a significant amount of local service. . . . [The FCC agreed] that this should be the only time that an incumbent LEC should request an audit.[36]

Thus, the FCC's text and footnote, in which it states that audits shall not be routine and may conducted only if an incumbent LEC has a concern regarding compliance, adopts a limitation on an incumbent LEC's right to audit that indicates that the FCC did not craft a balance or trade-off as simple as that suggested by BellSouth and accepted by the Hearing Officer. That interpretation essentially makes a nullity of the FCC's language requiring a concern and stating

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34 *First Supplemental Order*, 15 FCC Rcd 1760, ¶ 2.

35 *See Order* at 8.

36 *Supplemental Order*, 15 FCC Rcd 9587, 9603 ¶¶ 29, 31 n.86 (emphasis added).

that audits would be limited and not routine.[37] If the FCC had intended to strike the "balance" asserted by BellSouth, the FCC would have had no need to add footnote 86 (which is no less part of the FCC's *Supplemental Order* than any other part). If BellSouth's stated position was correct, then audits would be performed as a matter of course and would be expected, most competitive LECs would not have refused BellSouth's audit request (as they have) and this would not be the first proceeding of its kind (as it is). By definition, the standard under this interpretation would be "routine". This is clearly not what the FCC intended.

As shown in Section I, BellSouth has failed to provide a reasonable basis for a concern to support the initiation of an audit of NuVox. Permitting an audit under these circumstances would allow BellSouth to commence a routine fishing expedition and would make a nullity of the FCC's limiting language requiring a concern. Because the FCC found in the *Supplemental Order* that audits would be limited and not routine and would be undertaken only if the incumbent LEC had a reasonable concern regarding compliance, the Hearing Officer's conclusion that BellSouth should be permitted to commence the audit is in error. In light of this error, NuVox respectfully requests that the Commission modify or reverse the *Order* to the extent that it grants BellSouth's request to audit.

## III. The Hearing Officer Mistakenly Accepted BellSouth's Mischaracterization of NuVox's Position with Respect to the Independence of the Proposed Auditor and BellSouth's Mischaracterization of FCC Precedent

In concluding that NuVox has failed to provide convincing evidence that American Consultants Alliance ("ACA"), the auditor selected by BellSouth, lacks independence,[38] the *Order* accepts mischaracterizations made repeatedly by BellSouth with respect to NuVox's

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37 *Id.*, 15 FCC Rcd 9603 ¶ 31 n.86.

38 *Order* at 8.

stated position and FCC precedent. In doing so, NuVox respectfully submits that the Hearing Officer erred in her conclusions.

First, rather than challenging ACA's ability to conduct an unbiased, and therefore, independent, audit based on the assertion that ACA had merely "some" experience or affiliation with incumbent LECs,[39] NuVox's contention has always been that ACA has had virtually no experience other than incumbent LEC experience.[40] NuVox agrees with that it would be difficult to hire any expert in the telecommunications industry that has not had some affiliation with an incumbent LEC.[41] At Oral Argument, NuVox underscored this point by noting that some of its high level management had come from incumbent LECs such as BellSouth.[42]

However, in this case, BellSouth has proposed to use as its auditor a consulting enterprise whose principals each have had lengthy prior careers with incumbent LECs and whose client base appears to be comprised almost entirely of incumbent LECs.[43] Moreover, the auditor selected by BellSouth characterizes successful audits as those that reap large monetary rewards for its incumbent LEC clients.[44] Thus, this is not a case of "some" affiliation with an incumbent,[45] rather it is a case of almost no other experience and, more importantly, complete dependence on an incumbent LEC client base that the selected auditor likely must continue to

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39 *Order* at 9.

40 NuVox Answer, ¶ 23, NuVox FCC Petition at 6-7 (attached to NuVox Answer), NuVox FCC Response to BellSouth Opposition, at 7-8 (NuVox Exhibit 1), Tr. at 25-33, 40-43.

41 *See Order* at 9.

42 Tr. at 26, 25-33, 40-43.

43 NuVox Answer, ¶ 23, NuVox FCC Petition at 6-7 (attached to NuVox Answer), NuVox FCC Response to BellSouth Opposition, at 7-8 (NuVox Exhibit 1), Tr. at 25-33, 40-43, 52-53.

44 Tr. at 30-31 (referring to ACA proposal to BellSouth dated February 20, 2002, included in NuVox Exhibit 1 as part of Attachment B (see discussion at pages 7-8 of NuVox Exhibit 1).

45 *See Order* at 9.

please to remain a viable business. These circumstances suggest a bias (indicating a lack of independence) that would be difficult to overcome, notwithstanding the best of intentions.

Second, it appears that the Hearing Officer accepted BellSouth's contention that "the FCC adopted the AICPA standard only in connection with the merger of Ameritech and SBC."[46] BellSouth provided no support for this contention and it is simply wrong. The FCC has looked to the standards adopted by the American Institute of Certified Public Accountants ("AICPA") to ascertain the independence of auditors in numerous and varied proceedings.[47] There is simply no evidence that the FCC intended to insulate its *Supplemental Order* from that line of precedent and condone audits by auditors that did not comply with the AICPA standards governing auditor independence. Thus, because the FCC repeatedly has looked to AICPA standards in determining the independent status of auditors, the Hearing Officer's apparent acceptance of BellSouth's unsupported and inaccurate contention that the FCC adopted the AICPA standards only on one limited instance and did not intend to judge independence by the commonly accepted AICPA standards was in error.

NuVox also submits that even the Black's Law Dictionary definition of "independent" that was cited in the *Order* provides support for NuVox's claim that ACA cannot be fairly characterized as independent. That ACA's client base consists almost entirely of incumbent

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46 *See Order* at 9.

47 *See, e.g.*, SBC Communications, Inc., *Order*, 17 FCC Rcd 10780, 10792 (2002); Accounting Safeguard Under the Telecommunications Act of 1996: Section 272(d) Biennial Audit Procedures, *Memorandum Opinion and Order*, 17 FCC Rcd 1374, 1376 ¶ 6 & n.15 (2002); Qwest Communications International, Inc., File No. ENF-99-11, *Order*, FCC 00254 (2000); GTE Corporation and Bell Atlantic Corporation, *Memorandum Opinion and* Order, 15 FCC Rcd 14032, 14190 (2000); Qwest Communications International, Inc. and U.S. WEST, Inc., *Memorandum Opinion and Order*, 15 FCC Rcd 5376, 5390-91 (2000); Request of Lockheed Martin Corporation and Warburg, Pincus & Co. for Review of the Transfer of the Lockheed Martin Communications Industry Services Business, *Order*, 14 FCC Rcd 19792, 19813 (1999); Ameritech Corp. and SBC Communications, Inc., Memorandum Opinion and Order, 14 FCC Rcd 14712, 14882-84 (1999); Proposed Model for Preliminary Biennial Audit Requirements, *Public Notice*, 12 FCC Rcd 13132 (1997). Additional examples can be provided upon request.

LECs shows that ACA is in fact dependent on the incumbent LEC community as its principal revenue source, and therefore, is certainly susceptible to being influenced by the views and positions of incumbent LECs such as BellSouth. Thus, ACA is not independent under the Black's definition which provides, in part, that "independent" means "not subject to the . . . influence of another" and "not dependent or contingent upon something else".[48] Accordingly, NuVox respectfully requests that, to the extent that the *Black's* definition of independent should be applied, the Hearing Officer erred in applying it to the facts in this case.

Based on the foregoing, NuVox respectfully requests that the Commission modify or reverse the *Order* and find that the auditor selected by BellSouth lacks independence, and that, as a result, BellSouth has violated the *Supplemental Order,* and may not proceed with the audit.

## IV. Because NuVox Would Be Irreparably Harmed If the Audit Were to Proceed and NuVox Prevailed On This Application, There is Good Cause for the Commission to Stay the *Order*

Finally, NuVox requests that the Commission use its discretionary authority, pursuant to O.C.G.A. § 50-13-19(d), to stay the effect of the *Order* until review has been completed. That subsection provides that "the agency may grant . . . a stay upon appropriate terms for good cause shown." There is good cause for the Commission to stay the *Order*. A stay is warranted under the circumstances here for the purpose of preserving NuVox's administrative and judicial remedies. Resolution of the issues raised in this Application will determine whether BellSouth is permitted to initiate an audit. Without a stay, NuVox will be irreparably harmed because once the audit proceeds, NuVox will have forever lost the normal rights of due process and appeal afforded under administrative procedures to prevent the audit. Based on NuVox's showing in

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[48] *Order* at 9 (citing *Black's Law Dictionary, Seventh Edition*).

this Application that the Hearing Officer's decision to grant the audit request are based on erroneous findings of fact and law, there is reason to conclude that NuVox has a reasonable probability of success on the merits. Additionally, BellSouth is adequately protected because in the event the Commission decides to grant the audit request, the time period during which the stay was in effect would not be precluded from audit.

## Conclusion

Based on the foregoing, NuVox respectfully requests that the Commission modify or reverse the *Order* as discussed herein.

Respectfully submitted,

**NUVOX COMMUNICATIONS, INC.**

Date: November 26, 2002

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## CERTIFICATE OF SERVICE

I, Anne W. Lewis, hereby certify that on this 26th day of November 2002, a copy of the foregoing *Application to Modify or Review Order, and to Stay Order Pending Review of NuVox Communications, Inc.* was served via United States Mail, with adequate postage attached thereto, on the following parties:

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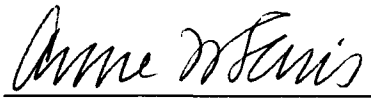

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December 11, 2002

**DELIVERED BY HAND**

Mr. Reece McAlister
Executive Secretary
Georgia Public Service Commission
244 Washington Street, S.W.
Atlanta, Georgia 30334-5701

Re: *Enforcement of Interconnection Agreement between BellSouth Telecommunications, Inc. and NuVox Communications, Inc.*; Docket No. 12778-U

Dear Mr. McAlister:

Enclosed please find an original and eighteen (18) copies, as well as an electronic version, of BellSouth Telecommunications, Inc.'s Response to Application to Modify or Review Order filed by NuVox Communications, Inc. in the above-referenced proceeding. I would appreciate your filing same and returning three (3) copies of this correspondence stamped "filed" in the enclosed self-addressed and stamped envelopes.

Thank you for your assistance in this regard.

Yours very truly,

Bennett L. Ross

BLR:nvd
Enclosures

cc: The Honorable Nancy G. Gibson
Parties of Record

472437/462373

**BEFORE THE**
**GEORGIA PUBLIC SERVICE COMMISSION**

| | | |
|---|---|---|
| In Re: | ) | |
| | ) | |
| Enforcement of Interconnection Agreement between BellSouth Telecommunications, Inc and NuVox Communications, Inc. | ) | Docket No. 12778-U |

**BELLSOUTH TELECOMMUNICATIONS, INC.' RESPONSE TO NUVOX'S APPLICATION TO MODIFY OR REVIEW ORDER**

## I. INTRODUCTION

BellSouth Telecommunications, Inc. ("BellSouth") respectfully submits its response to the application filed by NuVox Communications, Inc. ("NuVox") requesting that the Commission modify or review the Recommended Order of the Hearing Officer dated November 4, 2002. In the Recommended Order, the Hearing Officer decided that BellSouth is entitled to audit NuVox's records to verify whether NuVox is providing a significant amount of local exchange traffic over combinations of loop and transport network elements. The Hearing Officer's decision is correct and should be adopted by the Commission.

In its application NuVox raises a number of complaints about the Hearing Officer's Recommended Order, none of which has merit. The Hearing Officer correctly found that BellSouth had not violated the audit requirements set forth in the June 2, 2000 Supplemental Order Clarification issued by the Federal Communications Commission ("FCC") in *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 00-183 ("*Supplemental Order*"), even assuming such requirements applied to this case, which is an issue the Hearing Officer did not resolve.

Although NuVox voluntarily negotiated an Interconnection Agreement ("Agreement") that gives BellSouth the absolute right to conduct an audit upon 30 days' notice, NuVox is desperately seeking to ensure that no such audit takes place. This is clear from NuVox's own filing, in which NuVox seeks a stay "to prevent the audit" from ever occurring. NuVox never explains what harm it will suffer if the audit proceeds. The audit will not cost NuVox anything, since, under the terms of the Agreement, BellSouth must bear all the audit costs. The audit will not be burdensome to NuVox, since BellSouth has agreed to conduct the audit at NuVox's premises and to conclude the audit as expeditiously as possible.

The only plausible explanation for the depths to which NuVox is apparently prepared to go to prevent an audit is a concern about what the audit will uncover. On the one hand, if the audit reveals that NuVox is not providing a significant amount of local exchange traffic over combinations of loops and transport network elements, NuVox will have engaged in regulatory arbitrage, which this Commission should not condone. On the other hand, if the audit reveals that NuVox is providing a significant amount of local exchange traffic, this case will be over. However, neither this Commission nor BellSouth will know for certain what an audit will show unless the audit is permitted to proceed. Accordingly, the Commission should adopt the Recommended Order and deny NuVox's application and request for a stay.

## II. DISCUSSION

### A. The Audit Requirements In The FCC's Supplemental Order Do Not Apply In This Case.

NuVox devotes its entire application to challenging BellSouth's compliance with the requirements for audits under the *Supplemental Order,* even though such requirements do not apply in this case. Although the Hearing Officer decided that it was not necessary to resolve this issue, the law could not be clearer that BellSouth's right to conduct an audit of NuVox's records

is governed solely by the terms of Agreement between BellSouth and NuVox. Attachment 2, Section 10.5.4 of that Agreement allows BellSouth, upon 30 days' notice, to conduct an audit of NuVox's records to verify that NuVox is providing a significant amount of local exchange traffic over combinations of loop and transport network elements. The Agreement does not require that BellSouth meet any of the conditions in the *Supplemental Order* prior to conducting that audit.

The audit provision in the Agreement was voluntarily negotiated by BellSouth and NuVox pursuant to Section 252(a)(1) of the Telecommunications Act of 1996 ("1996 Act"), as were all of the other terms in the parties' Agreement. As such, the parties' Agreement controls the circumstances under which an audit may be conducted, and the FCC's *Supplemental Order* has no binding legal effect in this case. The FCC's *Supplemental Order* cannot legally be substituted for specific language negotiated by the parties and incorporated into their approved Interconnection Agreement, and thus there is no need for the Commission to even reach the issues NuVox has raised in its attempt to prevent an audit from taking place.

Section 251(a) of the 1996 Act imposes various duties on telecommunications carriers, and Sections 251(b) and (c) impose additional duties on local exchange carriers and incumbent local exchange carriers ("ILECs"), respectively. *See* 47 U.S.C. § 251(a) - (c). One of the duties imposed upon all carriers is to "negotiate in good faith" interconnection agreements to fulfill the duties described in Sections 251(b) and (c). This allows an ILEC to meet its obligations under Sections 251(b) and (c) by entering into an interconnection agreement with a requesting carrier through the procedures outlined in Section 252.

Section 252 contemplates two methods by which parties may enter into an interconnection agreement. The first is through voluntary negotiation, which is what occurred between BellSouth and NuVox. If carriers are unable to negotiate voluntarily an interconnection

agreement, either party may petition the state public service commission to arbitrate any open issues. *See* 47 U.S.C. § 252(a).

Importantly, when parties negotiate and enter into an interconnection agreement on a voluntary basis, they may do so "without regard to the standards set forth in subsections (b) and (c) of Section 251." 47 U.S.C. § 252(a)(1). In other words, parties who voluntarily negotiate an interconnection agreement – like BellSouth and NuVox – bind themselves to the terms of that agreement, which may or may not incorporate all of the substantive obligations imposed under Sections 251(b) and (c) and any implementing FCC rules. *See AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 373 (1999) (recognizing that "an incumbent can negotiate an agreement without regard to the duties it would otherwise have under Section 251(b) or Section 251(c)"); *MCI Telecommunications Corp. v. U.S. West Communications*, 204 F.3d 1262, 1266 (9th Cir. 2000) ("The reward for reaching an independent agreement is exemption from the substantive requirements of subsections 251(b) and 251(c)"). As the Eighth Circuit Court of Appeals explained, voluntarily negotiating an interconnection agreement allows a competing carrier and an ILEC to "agree to rates or terms that would not otherwise comply with the law or be required under the Act, as long as the state commission ultimately approves." *Southwestern Bell Telephone Co. v. Missouri Public Service Comm'n*, 236 F.3d 922, 923 (8th Cir. 2001).

The ability of carriers to negotiate an interconnection agreement "without regard to subsections (b) and (c) of Section 251" extends to rules and orders of the FCC – such as the *Supplemental Order. Iowa Utilities Bd. v. FCC*, 120 F.3d 753, n. 9 (8th Cir. 1997), *aff'd in part, rev'd in part on other grounds, AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366 (1999) ("The FCC's rules and regulations have direct effect only in the context of the state-run arbitrations, because an incumbent LEC is not bound by the Act's substantive standards in conducting

voluntary negotiations"). The FCC has acknowledged as much, noting that "parties that voluntarily negotiate agreements need not comply with the requirements we establish under Sections 251(b) and (c), including any pricing rules we adopt." First Report and Order, CC Docket 96-98, ¶¶ 54 & 58 (Aug. 6, 1996).

In this case, BellSouth and NuVox voluntarily negotiated an interconnection agreement that was approved by this Commission. As part of that agreement, the parties agreed to the specific terms and conditions under which unbundled loop and port combinations could be substituted for special access services, including language governing any audit conducted by BellSouth. Consistent with the 1996 Act, the voluntarily negotiated agreement between BellSouth and NuVox does not have to comport with the requirements of the FCC's *Supplemental Order.* Accordingly, BellSouth's request to conduct an audit of NuVox's records is controlled by the parties' Agreement, and not by any audit requirements adopted by the FCC. *See Law Offices of Curtis V. Trinco LLP v. BellAtlantic Corp.*, 294 F.3d 307, 322 (2d Cir. 2002) (refusing to allow a requesting carrier to "end run the carefully negotiated language in the interconnection agreement by bringing a lawsuit based on the generic language of section 251"); *Verizon New Jersey Inc. v. Ntegrity Telecontent Services Inc.*, 2002 U.S. Dist. LEXIS 1471 (D.N.J., Aug. 12, 2002) (holding that upon approval of a negotiated interconnection agreement, "the duties of each party are defined by the parameters of their agreement rather than Section 251(b) and (c)" and that a party "may not rely upon the general duties imposed by Section 251 to litigate around the specific language provided in the negotiated contracts...").

NuVox does not and cannot cite any contrary legal authority. Instead, in prior filings, NuVox has relied upon Georgia contract cases in an attempt to argue that the *Supplemental Order* somehow "trumps" the parties' Agreement. However, such reliance is misplaced.

First, the Agreement is a creature of federal law; it embodies obligations created by federal law and is negotiated and approved pursuant to federal law requirements. Federal law – as interpreted in such cases as *Law Offices of Curtis V. Trinco LLP* and *Ntegrity* -- squarely holds that the duties of a party to a negotiated interconnection agreement under the 1996 Act are governed by the terms of that agreement, even though the agreement may contain obligations different than those that would otherwise apply by operation of Section 251(b) or Section 251(c).

Second, even Georgia law recognizes that parties to a contract "may stipulate for other legal principles to govern their contractual relationship than those prescribed by law," as long as such intent is "expressly stated in the contract." *See Jenkins v. Morgan,* 100 Ga. App. 561, 112 S.E.2d 23, 23 (1959). That is precisely the case here, as the parties clearly agreed to the conditions for an audit that differ from those adopted by the FCC in its *Supplemental Order.*

In Section 10.5.4 of the Agreement (emphasis added), the parties agreed as follows:

> *BellSouth may, at its sole expense, and upon thirty (30) days notice to [NuVox], audit [NuVox's] records not more than one [sic] in any twelve month period, unless an audit finds non-compliance with the local usage options referenced in the June 2, 2000 Order, in order to verify the type of traffic being transmitted over combinations of loop and transport network elements.* If, based on its audits, BellSouth concludes that [NuVox] is not providing a sufficient amount of local traffic over the combinations of loop and transport network elements, BellSouth may file a compliant with the appropriate Commission, pursuant to the dispute resolution process as set forth in this Agreement. In the event that BellSouth prevails, BellSouth may convert such combinations of loop and transport network elements to special access services and may seek appropriate retroactive reimbursement from [NuVox].

Under the Agreement, the only requirement for an audit to which the parties agreed is that BellSouth give 30-days' notice; the parties omitted any requirement that the auditor be "independent" or that BellSouth have a "concern" before conducting an audit. The parties also agreed that BellSouth must pay for the cost of any audit regardless of what the audit uncovers, which is a different arrangement than contemplated under the FCC's *Supplemental Order. See*

*Supplemental Order*, ¶ 31 (competitive LEC must reimburse the ILEC for the cost of the audit "if the audit uncovers non-compliance with the local usage options).

To the extent NuVox was interested in having the FCC's audit requirements govern an audit by BellSouth, NuVox could have asked during negotiations that the specific audit language from the *Supplemental Order* be incorporated by reference into the parties' Agreement. Nuvox did just that with respect to the definition of a "significant amount of local exchange service," which is required for NuVox to utilize unbundled loop and transport combinations. In Section 10.5.2 of Attachment 2 of the Agreement, the parties agreed that "a 'significant amount of local exchange service' is as defined in the FCC's Supplemental Order Clarification, released June 2, 2000, in CC Docket No. 96-98 ("June 2, 2000 Order")."

However, with respect to audit rights, the parties did not incorporate the FCC's audit requirements by reference. Nor did the parties include any audit language from the *Supplemental Order*. This omission was intentional, as the first sentence of Section 10.5.4 that gives BellSouth the right to audit makes explicit mention of the safe harbors under the *Supplemental Order*, but omits any discussion of or reference to the audit requirements in that order. Section 10.5.4 is unambiguous, and there is no valid theory under Georgia law by which the *Supplemental Order* can be both an express contract term (for purposes of the FCC's safe harbors) and an implied contract term (for audit purposes) in the same sentence of a contract. *See Moore & Moore Plumbing, Inc. v. Tri-South Contractors, Inc.*, 256 Ga. App. 58, 567 S.E.2d 697 (2002) ("Where contract language is unambiguous, construction is unnecessary and the court simply enforces the contract according to its clear terms"); *Sosebee v. McCrimmon*, 228 Ga. App. 705, 492 S.E.2d 584 (1997) ("Courts are not at liberty to revise contracts while professing to construe them").

The law is clear that neither the unbundling requirements of Section 251(c) nor the FCC's rules and orders implementing those requirements can override the express terms of the BellSouth – NuVox Agreement. Because BellSouth and NuVox voluntarily agreed to audit terms in their Agreement, BellSouth's ability to audit NuVox's records is governed solely by those terms. Consistent with the plain language of Section 252(a)(1) and the holding of every case to address the issue, BellSouth's audit rights are not governed by the FCC's *Supplemental Order*, which constitutes an independent ground for the Commission to adopt the Recommended Order.[1]

### B. The Hearing Officer Correctly Found That BellSouth Had Stated A "Concern" That Justifies An Audit Under The FCC's Supplemental Order.

Even assuming the audit provisions in the *Supplemental Order* apply in this case, the Hearing Officer correctly found that BellSouth had stated a valid "concern" that would justify an audit consistent with the *Supplemental Order*. Specifically, the Hearing Officer pointed to records from Tennessee and Florida indicating that an inordinate amount of traffic from NuVox is not local and the fact that NuVox had changed its jurisdictional factor significantly, which, according to the Hearing Officer, were sufficient grounds for BellSouth's "concern."

In challenging the Hearing Officer's findings, NuVox argues that BellSouth has not provided "evidence" establishing that "NuVox has not properly self-certified compliance with FCC safe harbor Option 1." Application at 4. However, this argument misses the mark because no such "evidence" is required. Notwithstanding NuVox's claims to the contrary, the FCC's

[1] The outcome in this case might be different if the parties' Interconnection Agreement were silent on the issue of the extent to which unbundled loop and port combinations could be substituted for special access services or BellSouth's ability to conduct an audit. In such a case, an argument could be made that the interconnection agreement should be interpreted and enforced consistent with applicable law, which would include the substantive requirements set forth in the FCC's *Supplemental Order*. However, that is not this case, since the BellSouth-NuVox Agreement is not silent on these issues and contains express language negotiated by the parties setting forth the specific circumstances under which an audit would be conducted.

*Supplemental Order* does not contemplate, let alone mandate, that BellSouth must prove that NuVox has failed to satisfy the safe harbor requirements before being able to conduct an audit. Rather, as the Hearing Officer correctly observed, "The FCC made no specific conditions or standard of evidence with respect to the level of concern." Recommended Order at 8.

Furthermore, NuVox's insistence that BellSouth prove that NuVox has not properly self-certified compliance with the FCC's safe harbor before conducting an audit would establish a standard that could rarely, if ever, be met. Evidence that would conclusively establish whether or not NuVox is the exclusive provider of the end user's local exchange service is information possessed by NuVox and its customers, not BellSouth. To require BellSouth to prove that NuVox is not the exclusive local service provider as a prerequisite to conducting an audit would likely mean that no audits would ever be conducted and would make an audit completely unnecessary. Such a result is certainly not what the FCC had in mind, as the Hearing Officer explained:

> The FCC's intention appears to be a trade-off for providing the CLEC with the automatic conversion while allowing the ILECs an opportunity to verify the local usage options. For that reason, the FCC crafted a balance between the CLEC's self-certification and automatic conversion and the ILEC's right to ensure compliance.

Recommended Order at 8. NuVox invites this Commission to disrupt that carefully "crafted balance" by requiring that BellSouth prove a violation of the safe harbor requirements as a precondition to conducting an audit – an invitation the Commission should respectfully decline.

The FCC's passing reference that an audit could be undertaken only when the ILEC "has a concern that the requesting carrier is not meeting the qualifying criteria for providing a significant amount of locale exchange service" does not create a "'limited' audit right," as NuVox contends. Application at 11. In paragraph 31 of the *Supplemental Order*, the FCC was

expressing its agreement with WorldCom that the provisioning of an unbundled loop and transport combination for a requesting carrier should occur upon request and should not be delayed by the ILEC's requiring an audit prior to provisioning. In a footnote to the FCC's finding that an audit should not be required prior to provisioning an unbundled loop and transport combination for a requesting carrier, the FCC merely acknowledged a February 28, 2000 Joint Letter stating that "audits will not be routine practice, but will only be undertaken when the incumbent LEC has a concern that a requesting carrier has not met the criteria for providing a significant amount of local exchange service." The FCC agreed that "this should be the only time that an incumbent LEC should request an audit." Thus, the "limitation" embraced by NuVox was merely a statement that audits would not be conducted prior to provisioning unbundled loop and transport combinations, and that both ILECs and CLECs had previously stated that audits would not be routine.[2]

In challenging the factual basis for BellSouth's concern, NuVox complains that the usage records indicating that an inordinate amount of traffic from NuVox is not local pertain to Tennessee and Florida, not Georgia. Application at 4-6. However, NuVox raised this same complaint before the Hearing Officer, who considered and rejected it. Recommended Order at 6. This Commission should do likewise. The issue in this case is whether NuVox is providing a significant amount of local exchange traffic over combinations of loop and transport network elements purchased under the NuVox – BellSouth Agreement. Importantly, the NuVox – BellSouth agreement is a nine-state interconnection agreement. Thus, usage records pertaining

[2] NuVox's claim that the FCC granted "only a 'limited' audit right" concerning self-certified compliance is pure fabrication. Application at 11. The FCC's only use of the word "limited" in the context of an audit pertains to the agency's finding that "incumbent LECs may conduct *limited* audits only to the extent reasonably necessary to determine a requesting carrier's compliance with the local usage options ...." *Supplemental Order* ¶ 29 (emphasis added). Thus, the FCC's reference to a "limited audit" pertains to the scope of the audit, and not the circumstances when that audit may be conducted.

to any of the nine states – including Tennessee and Florida -- are relevant to determining whether NuVox has properly self-certified under the Agreement.

NuVox also claims that the fact that BellSouth's records reflect that local traffic constituted only 25% of the total traffic on NuVox's network in one state should be disregarded because NuVox's "jurisdictional factors for local traffic are higher than 90% in Georgia, Florida, Tennessee and the other BellSouth states." Application at 5-6. This claim is misguided. First, there is no need for this Commission to resolve an evidentiary dispute about traffic usage as a prerequisite to conducting an audit. The resolution of such a dispute is only appropriate in the event BellSouth, after completing the audit, seeks to establish that NuVox is not providing a significant amount of local exchange traffic over combinations of loop and transport network elements. Second, the discrepancy between BellSouth's records of NuVox's traffic and the jurisdictional factors supplied by NuVox suggests that something is amiss because one would expect traffic patterns and jurisdictional factors to be relatively consistent. This discrepancy constitutes another basis for allowing the audit to proceed.

Finally, NuVox complains that the fact that BellSouth's records reflect that local traffic constituted only 25% of the total traffic on NuVox's network in one state "is neither indicative nor probative of compliance with the FCC safe harbor Option 1" because, according to NuVox, Option 1 "does not require that any percentage of local traffic be generated by the end user served or carried over the converted circuits." Application at 8-9. NuVox is correct that the FCC found that a converted circuit may be used to carry "100 percent access traffic" under Option 1. However, the issue before the Commission is not whether NuVox has complied with the requirements of Option 1, but rather whether BellSouth has stated a "concern" about NuVox's compliance that would justify an audit.

In this case BellSouth's concern is that Nuvox's circuits carrying only 25% local traffic may indicate that NuVox is not the exclusive provider of local exchange service for the customers NuVox is serving because, if NuVox were the exclusive provider, one would expect a significant percentage of NuVox's traffic to be local, since most customers typically generate considerably more local calls than toll calls. To be sure, an audit may very well establish that NuVox is in full compliance with the local usage requirements and that its particular end users merely generate a substantial percentage of access traffic as compared to all traffic generated by those end users. However, neither BellSouth nor the Commission will know for certain until an audit is conducted. The Commission should not allow NuVox to delay further this audit by continuing to challenge the adequacy of BellSouth's stated cause for concern.

### C. The Hearing Officer Correctly Found That The Auditor Selected By BellSouth Is "Independent" Under The FCC's Supplemental Order.

The Hearing Officer rejected NuVox's attempts to challenge the independence of the auditor selected by BellSouth, finding unpersuasive NuVox's claims that the auditing firm – American Consultants Alliance ("ACA") – consists of principals who "had prior careers with ILECs and whose client base appears to be comprised almost entirely of ILECs." Recommended Decision at 8-9. The Hearing Officer correctly concluded that it was unlikely that "one could hire any expert in the telecommunications industry that has not had some affiliation with an ILEC" and that any claim of bias could be adequately addressed by the Commission whenever the audit is complete. Recommended Decision at 9-10.

In its Application NuVox repeats the same arguments that the Hearing Officer considered and rejected. Specifically, NuVox argues that ACA is not "independent" because the firm's principals "have had lengthy prior careers with incumbent LECs" and have "virtually no experience other than incumbent LEC experiences." Application at 12-13. The fallacy in

NuVox's argument is the fact that ACA's principals may have spent their entire careers working for ILECs other than BellSouth does not mean that ACA is "subject to the control or influence" of BellSouth, nor does it mean that ACA is "associated with" BellSouth or "dependent" upon BellSouth, which the Hearing Officer correctly concluded was the standard for adjudging "independence." Recommended Order at 9. Furthermore, under NuVox's theory, an auditor who spends 25 years with an ILEC other than BellSouth is not independent, but magically becomes "independent" by spending some undetermined amount of time with a CLEC. This theory does not even make walking around sense. Taken to its illogical extreme, under NuVox's theory, NuVox was "subject to BellSouth's control" the day its management left jobs with other ILECs to join NuVox, which is silly.

NuVox also challenges the independence of ACA, arguing that the firm is "*dependent*" on the incumbent LEC community as its principal revenue source, and, therefore, is certainly susceptible to being *influenced* by the views and positions of incumbent LECs such as BellSouth." Application at 14-15. This argument is flawed because the issue is whether ACA is independent of BellSouth. Resolving this issue requires the Commission to consider the relationship between ACA and BellSouth and not ACA's relationship with the entire "incumbent LEC community." ACA's relationship with the entire "incumbent community" has nothing to do whether ACA is "dependent" upon BellSouth or subject to "influence or control" by BellSouth. There is simply no evidence that even remotely suggests that BellSouth is ACA's "principal revenue source" or that BellSouth "influences" or "controls" ACA, and NuVox points to none in its filing.

Finally, NuVox takes issue with the standard of independence applied by the Hearing Officer, claiming that the Hearing Officer should have applied standards adopted by the

American Institute of Certified Public Accountants ("AICPA"), since the FCC has applied these standards in "numerous and varied proceedings." Application at 14. This argument is without merit because in each proceeding in which the FCC has applied the AICPA standards, the FCC clearly required the use of those standards. *See, e.g., In re: SBC Communications, Inc.,* 17 FCC Rcd 10780, 10792 (2002) (requiring that the final audit program "be determined by the independent auditor based upon AICPA standards ..."); *In re: Accounting Safeguards Under the Telecommunications Act of 1996; Section 272(d) Biennial Audit Procedures,* 17 FCC Rcd 1374, 1376 (2002) (requiring Section 272 biennial audit to be conducted in accordance with "AICPA ATTESTATION STANDARDS"); *In re: Quest Communications International, Inc.,* 15 FCC Rcd 14699 (2000) (requiring that the examination "be supervised by persons licensed to provide public accounting services and shall be conducted in accordance with the relevant standards of AICPA"); *In re: Application of GTE Corporation,* 15 FCC Rcd 14032 (2000) ("The independent auditor will conduct its examination in accordance with the standards of ... AICPA"). In this case, there is nothing in the FCC's *Supplemental Order* indicating that the AICPA standards apply to an audit of the type at issue here. Had the FCC intended that AICPA standards should apply in this situation, it certainly would have said so.

**D. NuVox's Request For A Stay Should Be Rejected.**

Citing O.C.G.A. § 50-13-19(d), NuVox requests the Commission to "stay the effect of the [Recommended Order] until review has been completed." This request is misguided because Section 50-13-19(d) only applies to a stay of a "final decision in a contested case." Here, there is no "final decision" that can or should be stayed. The Recommended Order merely constitutes "proposed written findings of fact based upon the evidence in the record" that the Hearing Officer has provided to the Commission as required by O.C.G.A. § 46-2-58(d), which

the Commission must decide whether to adopt. Until the Commission does so, NuVox's request for a stay is premature.

Furthermore, in order to obtain a stay, NuVox must show a likelihood of prevailing on the merits, which, as fully explained above, NuVox cannot do. *See In re: Federal Grand Jury Proceedings,* 975 F.2d 1488, 1491 (11th Cir. 1992) (denying stay pending appeal when petitioners failed to show a likelihood of prevailing on the merits). Likewise, NuVox's application is completely devoid of any "irreparable injury" that NuVox would suffer in the event the audit proceeds, which is an important prerequisite for obtaining a stay. *Id.* If NuVox appeals and in the unlikely NuVox prevails on the merits, NuVox could be adequately compensated for any out-of-pocket expenses associated with the audit, which is fatal to a showing of irreparable injury *See Deltona Transformer Corp. v. Wal-Mart Stores, Inc.,* 115 F. Supp. 2d 1361, 1364 (M.D. Fla. 1999) (irreparable injury requiring a showing that the petitioner "will suffer any injury that cannot be adequately compensated if, at some later point in time, it prevails on the merits"); *see also Sampson v. Murray,* 415 U.S. 61, 90 (1974) ("Mere injuries, however substantial, in terms of money, time, and energy necessarily expended in the absence of a stay are not enough" to demonstrate irreparable injury).

## III. CONCLUSION

The Commission should put to an end NuVox's repeated attempts to prevent an audit. As the Hearing Officer found, BellSouth is entitled to audit NuVox's records to verify whether NuVox is providing a significant amount of local exchange traffic over combinations of loop and transport network elements. Accordingly, the Commission should adopt the Hearing Officer's Recommended Order and allow the audit to proceed once and for all.

This 11th day of December, 2002.

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## CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing upon parties of record, by electronic mail and by depositing same in the United States Mail, with adequate postage thereon, addressed as follows:

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